Supreme Court of the United States

No. _____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RECORD REFERENCES.

The certified record filed with this application is an "Appendix Record", which contains four appendices, each of which is attached to one of the first four unnumbered pages of the certified record.

The appendix filed in the Court of Appeals by Rex Schepp and Benjamin F. Shepp is attached to the first *unnumbered* page of the Certified Record, and is herein referred to as R. Ap. I. This appendix is bound with a brief.

The appendix filed by appellees Producers, Inc. *et al.* is attached to the second *unnumbered* record page and is herein referred to as R. Ap. II.

The appendix filed by appellees Red Spot Paint and Varnish Co., *et al.* is attached to the third *unnumbered* record page and is herein referred to as R. Ap. IV. This appendix is also bound with a brief.

The appendix filed by Douglas H. McDonald, Trustee, is attached to the fourth *unnumbered* record page and is herein referred to as R. Ap. IV. This appendix is also bound with a brief.

The nine copies of each of such appendices filed herewith have been correspondingly marked with Roman Numerals, I, II, III and IV.

The Opinion of the Court of Appeals is printed as an appendix to this brief, with the original pagination indicated by asterisks, and is herein cited as OP. C. A. *1, etc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. _____

REX SCHEPP, AND BENJAMIN F. SHEPP,
Petitioners,

vs.

PRODUCERS, INC., TRAYLOR BROS., INC., INDUSTRIAL CONTRACTORS, INC., CARL WOLF, SMITH AND BUTTERFIELD, INC., RED SPOT PAINT AND VARNISH COMPANY, INC., DOUGLAS H. McDONALD, DOUGLAS H. McDONALD, TRUSTEE, AND EVANSVILLE TELEVISION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioners, Rex Schepp and Benjamin F. Shepp, would respectfully pray that this Court issue its Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit rendered in a certain cause entitled "In the Matter of Evansville Television, Inc., debtor; Rex Schepp and Benjamin F. Shepp Appellants *vs.* Producers, Inc., *et al.* Appellees," being Cause No. 13024 on the docket of said Court; and your petitioners respectfully present:

(a) The opinion in said cause has not been reported.

(b) The jurisdiction of this Court is invoked on the following grounds:

(i) The said judgment sought to be reviewed was rendered and entered on January 5, 1961 at 9:30 a.m.

(ii) No petition for rehearing was made and no order entered extending time to petition for certiorari.

(iii) The jurisdiction of this Court is invoked under 11 U. S. C. 47(c), 28 U. S. C. 1254 (1) and 28 U. S. C. 2101(c) which are set out in the appendix.

(c) The questions presented for review are:

(1) Whether or not want of the good faith required by 11 U. S. C. § 144 was conclusively demonstrated, in the filing of a Chapter X creditor's petition which was admittedly proposed as an alternative to relinquishment of control by the holders of majority voting stock, and implemented by a consenting answer voted by a board of directors a majority of whom, in combination with petitioning creditors, were seeking to purchase the majority voting stock on their own terms; (both by reason of the improper purpose of the filing and by reason of illegal means used to procure approval of the petition).

(2) Whether or not lack of good faith was conclusively demonstrated by an affidavit filed to comply with General Order 5(2) asserting on personal knowledge that one of the petitioning creditors (Producers, Inc.) had not acquired its claim for the purpose of instituting a bankruptcy proceeding, whereas it was admitted by the affiant that he did not have personal knowledge but merely hearsay knowledge, and that counsel for petitioning creditors had nevertheless provided the hearsay (in part) and procured and advised affiant to make this false affidavit of personal knowledge.

(3) Whether or not lack of good faith was conclusively demonstrated by a supplementary General Order 5(2) affidavit verified by the assignor of the claim in question who was also a controlling stockholder of all three petitioning creditors, stating the "true consideration" of the assignment as "$300,000.00 paid" to another petitioning creditor, whereas he admitted that no money had been paid and that the consideration was in fact a series of book credits and debits between corporations under unitary control.

(4) Whether or not a Chapter X creditor's petition originally defective for want of three creditors may be cured and supplemented after its approval by the intervention of additional creditors.

(5) Whether or not three corporations separately incorporated as parts of a single enterprise under unitary control constitute three creditors or only one within the meaning of U. S. C. § 526.

(6) In a Chapter X reorganization proceeding, after initial approval of the petition, but during hearings on timely stockholders' answers seeking dismissal of the petition, a temporary injunction was entered against the answering stockholders and also orders allowing compensation to the Trustee and counsel over the stockholders' objection. Were these interlocutory orders appealable on appeal from the final decree confirming approval of the petition, or were they only appealable within the time allowed by 11 U. S. C. § 48 and § 250?

(7) Whether each and all of the following acts of the District Court, sanctioned by the Court of Appeals constitute such a departure from the accepted course of judicial proceedings as to require revision by this court; namely:

(a) The District Court approved this Chapter X reorganization as filed in good faith and appointed a trustee upon the basis of a *consenting* answer purporting to be authorized by the Debtor's directors after a controverting answer had been filed which alleged that these directors had combined with petitioning creditors to defraud the stockholder of his rights, and without hearing any evidence on the issues tendered by the answer.

(b) The District Court, without prior application for injunction, without any notice that an injunction might issue, without any hearing upon whether an injunction should issue enjoined the calling, or holding of any meeting of the Debtor's stockholders, and the Court of Appeals has sanctioned this palpably arbitrary abuse of judicial power by dismissing petitioners' appeal and denying mandamus and prohibition.

(c) The District Court, after uncontradicted proof that a false affidavit had been filed under G. O. 5(2) and that the falsity of this affidavit in at least one respect had been not only known to but its making solicited by counsel for petitioning creditors, nevertheless refused to recognize this as a conclusive proof of the absence of "good-faith" and the Court of Appeals has not only sanctioned this but excused it on the basis of a substitute affidavit which was itself admittedly untrue.

(d) The statutes which the case involves, in addition to the jurisdictional statutes previously cited are:

Bankruptcy Act § 25, 11 U. S. C. § 48.

Bankruptcy Act § 59(b) and (f), 11 U. S. C. § 95(b) and (f).
Bankruptcy Act § 126, 11 U. S. C. § 526.
Bankruptcy Act § 136, 11 U. S. C. § 536
Bankruptcy Act § 137, 11 U. S. C. § 537.
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Bankruptcy Act § 144, 11 U. S. C. § 544.
Bankruptcy Act § 146(1), 11 U. S. C. § 546(1).
Bankruptcy Act § 161, 11 U. S. C. § 561.
Bankruptcy Act § 206-207, 11 U. S. C. § 606-607.
Bankruptcy Act § 250, 11 U. S. C. § 650.
General Order in Bankruptcy, 267 U. S. R. 613 5(2), 28 U. S. C. 1292.

STATEMENT.

This Was a Collusive "Reorganization" to Obtain Corporate Control.

This proceeding was begun as a creditors' petition for the reorganization of a corporation purporting to be filed pursuant to § 126, *et seq.*, of the Bankruptcy Act (11 U. S. C. 526, *et seq.*).

The three corporate petitioners are in fact three facets of a single unitary business enterprise which were successively organized by one Ferris Traylor to meet the needs of an expanding post-war business, all remaining under the control of Ferris Traylor by reason of the Stock ownership of himself and brother and their subordinates. (R. Ap. I, 38.) Stock of Traylor Bros., Inc. and Producers, Inc. was owned by the Traylor brothers 50% each. Each Traylor brother owned 25% of Industrial Contractors' stock. The remaining 50% was owned by employees of the three companies. (R. Ap. I, 18.) The three corporate petitioning creditors will be subsequently referred to as Traylor Bros., Producers, and Industrial, respectively.

Evansville Television, Inc. alleged debtor had issued and outstanding 25,000 shares of Class A voting stock and 25,000 shares of non-voting Class B stock. Fifteen thousand shares, a majority voting control, were held by petitioner Rex Schepp (11,000) his wife Mary Eaton Schepp (2,000) and his brother Benjamin F. Shepp (2,000). From and after June 12, 1956, until after the filing of this petition for reorganization, the board of directors of the debtor was controlled by Traylor, John W. Krueger, John Moser, and Freeman Keyes (holders of the remaining voting stock

and substantially all the non-voting stock) by virtue of a Buy-Sell option and voting trust agreement which had expired August 31, 1958. (R. Ap. I, 95.) Notwithstanding the expiration of this option, unexercised, Traylor remained President, and Traylor, Krueger, Moser and Keyes, directors, of the debtor when the petition was filed. (The above facts in more detail appear in the Opinion of the Court of Appeals, pp. *3 and *4. Freeman Keyes, not Krueger, was voting trustee.) (R. Ap. I, 96.)

"The purchase option expired August 31, 1958 without being exercised. The return of Schepp to control of the corporation at the February 1959 annual meeting was assured by reason of his control of the voting stock. There were various negotiations for the purchase from or sale to Schepp of the capital stock of the corporation. Traylor was willing to pay $10.00 a share for the stock." (C. A. Opinion *4.)

The Court of Appeals wholly ignores the tenor of these "various negotiations." In August 1956 Traylor requested an agreement that Schepp pay the Traylor indebtedness (over $400,000) and buy the minority stock at $10 per share — ($335,000.). On failure to produce this money, the Schepp 15,000 shares should be sold to Traylor for $150,000. (R. Ap. I, 43, 44, 72.)

In November 1958 Rex Schepp attempted to call a Stockholders' Meeting. (R. Ap. I, 72.) Traylor told Schepp if he could call off the meeting he would give him two or three weeks to sell the station, otherwise he would file receivership or bankruptcy proceedings. (R. Ap. I, 58, 73.) November 12, 1958 Traylor threatened bankruptcy or receivership unless Schepp produced around $450,000 and bought his stock at $10.00 per share. (R. Ap. I, 73.) Traylor told Schepp's attorney that he wanted receivership before the annual meeting in February. (R. Ap. I,

59; 60.) Traylor's attorney told Schepp's attorney that if Schepp would defer the annual meeting 30 to 50 days, *or would sign a buy-sell agreement*, he would defer filing for receivership. (R. Ap. I, 60.)

On the eve of the filing of the petition for reorganization, in response to a request by Schepp to meet with prospective purchasers, Early told Schepp: "You've got about 30 minutes or an hour to come over here and give that option; otherwise, we are going to file that bankruptcy matter." (R. Ap. I, 74.)

That this pressure was being applied on behalf of Krueger, Moser, and Keyes and not merely Traylor is made clear by the written buy-sell proposal made *after* filing the reorganization petition, by which it was proposed *to dismiss* the petition if Schepp would produce cash to pay Traylor's claims ($406,000 plus interest), $43,000 of other indebtedness of the debtor, buy *all* "minority" stock including that of Traylor, Krueger, Moser and Keyes for $350,000; or agree to sell the Schepp stock for $150,000 less one-half the costs accrued in reorganization and all costs over $3750.00. (R. Ap. I, 44, 98, 99, 100.) Dec. 23, 1958 Traylor, Krueger and Moser, as directors voted to file a consenting answer in the reorganization. (R. Ap. I, 93-95.)

The petition for reorganization was filed Dec. 19, 1958 and a receiver appointed Dec. 22, 1959. (R. Ap. I, 1.) Before Dec. 31, 1958 an answer, *confessing* the petition and *consenting* to approval, purporting to be authorized by the debtor's directors, was signed and verified by O'Daniel and filed by counsel whose employment was made by the same resolution. (R. Ap. I, 18, 19.) December 30, 1958 petitioner Rex Schepp filed a stockholders' controverting answer (R. Ap. I, 1) in which he charged *inter alia* that Ferris Traylor, O'Daniel and Krueger, as directors, had combined to cause the petition to be filed to defeat his (Schepp's) rights as a stockholder. (R. Ap. I, 14.)

December 31, 1958 hearing was had on the petition and consenting answer but no hearing was had on Schepp's controverting answer. (R. Ap. I, 16.) On January 2, 1959, the District Court entered his order approving the petition on the basis of the *consenting* answer. (R. Ap. I, 20.) The order does not even mention Schepp's controverting answer as then on file.

Thus the District Judge, without hearing, deliberately prejudged the validity of the consenting answer. More importantly, he ignored the absolute lack of good faith which would be manifest upon proof of the charge that Traylor (petitioning creditor) had combined with other directors to file the reorganization petition, and thereby prejudged that issue. In so doing the District Judge also ignored the admonition of Section 144 (11 U. S. C. 544) of the Bankruptcy Act, which plainly prescribes that issues made by a stockholder's answers including absence of good faith, shall be heard and determined before approving a petition.

It was later abundantly proved as hereinbefore shown, that Ferris Traylor, John Moser, John W. Krueger and Freeman Keyes had combined to obtain the controlling Schepp stock or otherwise oust Schepp's control, and that the reorganization petition was one of the means used to further that combination.

Supported by False Affidavits.

Producers, Inc. alleged in the petition that it was the holder of 27 demand notes aggregating $300,000 in principal amount (R. Ap. I, 5-6) originally executed to Ferris Traylor and by him indorsed to Producers on Nov. 20, 1958. (R. Ap. I, 10.) Producers was thus a "petitioner in involuntary proceedings whose claim rested upon assignment or transfer from" another person within the mean-

ing of General Order 5(2), 267 U. S. 613. To comply with G. O. 5(2) Producers, et al. filed the affidavit of Denis Stallings which asserted that these notes "were not purchased for the purpose of instituting a bankruptcy proceeding": that they had been assigned "in consideration of $300,000 being paid by Producers, Inc. to Traylor Bros., Inc. for the account of said Ferris E. Traylor"; and "the facts stated herein are personally known to affiant." (R. Ap. I, 11.)

This affidavit was later proved to be false in at least two respects. Stallings did not *personally* know *any* of the facts stated. (R. Ap. I, 35, 37.) He relied upon information furnished by counsel for petitioning creditors (Mr. Early and Mr. Gesas) who assured him that the statements were true and requested him to sign the affidavit. (R. Ap. I, 36.)

The statement that the consideration was $300,000 "paid" by producers to Traylor Bros. was likewise false. Traylor himself testified that the true consideration was a *book credit* to Traylor Bros. on Producers' books of account. (R. Ap. I, 40.) Traylor's own (G. O. 5-2) affidavit (R. Ap. I, 31) filed after the falsity of Stallings was demonstrated, was also false. *In the affidavit* he swore that "the true consideration was $300,000 *paid* by Producers, Inc. to Traylor Bros., Inc." (R. Ap. I, 31.) *In oral testimony* he swore that Producers debited Notes Payable and credited Traylor Bros.

His avowed "purpose" was to obtain tax money. (R. Ap. I, 40.) No evidence was introduced that any money was ever actually paid to Traylor Bros. or even Traylor himself, or any explanation of the "double play" when apparently a direct transfer to Traylor Bros. would have produced the credit, though of course it would have reduced the potential number of petitioning creditors to two.

Concerning this falsification the Court of Appeals said:

> "The incident of the affidavit, which was corrected by a new affidavit, in our opinion had no bearing on the issue of good faith either as to the objective of the proceeding or intention of the petitioners." * * (C. A. Opinion 26.)

There Were at Best Only Two Creditors Filing the Original Petition.

Wholly apart from the fact that the three corporations who joined in the original petition were in fact a single enterprise, under the control of Ferris Traylor, evidence adduced by petitioning creditors showed that one of these three was not a creditor of Evansville Television, Inc. The claims of both Traylor Bros., Inc. and Industrial Contractors, Inc. were for work done or performed and materials furnished at the special instance and request of the debtor. (R. Ap. I, 6.)

As to this "special instance and request" Mr. Traylor testified: "Mr. Schepp asked me and specifically Traylor Bros. to take charge of this construction work, and thereafter Industrial Contractors became a subcontractor under Traylor Bros." (R. Ap. I, 43.)

Since a subcontractor on a building is obviously not a creditor of the owner,* attempt was made to establish an implied contract with Industrial.

> "Industrial Contractors, Inc., a petitioning creditor, is a corporation engaged in the plumbing, heating and air conditioning and roofing business. The debtor corportation through its chief engineer issued direct orders to it for work and materials which were performed and furnished, and for which it issued invoices directly to the debtor corporation. The amount of its claim is $41,163.53." (C. A. Opinion *4.)

* At least not in Indiana. *The Lake Erie, Wabash & St. L. R. R. Co. v. Eckler* (1859), 13 Ind. 67, 68.

The record shows that no implied obligation to pay for work and material could have thus arisen. On September 24, 1956 the debtor's directors had unanimously resolved that no officer, agent or employee of the corporation should make, enter into or execute any contract, agreement, or understanding without first obtaining the directors' approval. (R. Ap. I, 91.) Work ordered from and done by Industrial was all ordered and done subsequent to Sept. 24, 1956; the earliest invoice being March 29, 1957. (R. Ap. I, 38, 93.) The directors never authorized a contract with Industrial. Industrial Contractors, Inc. was not a creditor of the debtor. Whatever was due on its claims was due Traylor Bros.

An Unsolicited Injunction Aided the Perpetuation of Minority Control.

After the approval order of Jan. 2, 1959, Benjamin F. Shepp filed a stockholders' controverting answer under Bankruptcy Act § 137 (11 U. S. C. 537).

Before hearings began on the stockholders' answers, Rex Schepp requested permission to use the debtor's office for holding a stockholders' meeting. (R. Ap. I, 2, 3.) The Trustee opposed granting this permission, but nowhere requested that the holding of the meeting be enjoined. (R. Ap. IV, 1-5.) Nevertheless, on Feb. 10, 1959, without prior application for an injunction, without any notice that an injunction might issue, without any intimation that an injunctive order was being considered, the District Judge entered an order "That no meeting of the stockholders be called or conducted for the purpose of electing new Directors until further order of the Court." (R. Ap. I, 27.) Motion to dissolve this injunction was promptly made. (R. Ap. I, 28.) It is undetermined as of the present time.

After the District Judge concluded the protracted hearings on the stockholders' answers and entered his final order of Feb. 12, 1960 (R. Ap. I, 86), the notice of appeal specified this injunctive order. (R. Ap. I, 90.)

The Court of Appeals held that an appeal from this injunctive order could not be taken on appeal from the final decree approving the petition, but only within the 40 days prescribed by Bankruptcy Act § 25 (11 U. S. C. 48). Opinion C. A. *9, *10.

Intervenors to the Rescue.

The application of Red Spot Paint and Varnish Co., *et al.* (hereinafter called Intervenors) to intervene *as additional petitioning creditors*, was filed March 5, 1959, and intervention was granted April 2, 1959. (R. Ap. I, 1, 2.) The original petition of Producers, *et al.* had been approved and a trustee appointed two months previously. (R. Ap. I, 20.) The following allegations of this verified petition were manifestly false, viz:

> "No other petition . . . against the debtor is pending under Chapter X." (R. Ap. I, 52.)

This intervention was allowed after it had been demonstrated, as hereinbefore stated, that Industrial was not a creditor, and that the G. O. 5(2) affidavits filed in support of Producers' claim were false.

The Appeal from Orders of Allowance.

The original petition was approved and the Trustee appointed Jan. 2, 1959. Hearings on the Stockholders' answers which demanded dismissal of the petition were not concluded until Jan. 7, 1960. (R. Ap. I, 2.) Meantime the District Court made various allowances of compensation to the Trustee and his counsel. The first of these

petitions for allowance having been set for hearing May 22, 1959, Rex Schepp and Benjamin F. Shepp, conceiving that the Court could not rightfully make allowances from the assets of the debtor in a Chapter X proceeding which should previously have been dismissed, objected to the making of any allowances and moved (1) to require security for repayment of any allowances made, and (2) forthwith to dismiss the petition and return to the debtor the assets in the hand of the Trustee. (R. Ap. I, 53.) The motion was denied. At this time allowances totaling $12,538.68 were made to Trustee and counsel. (R. Ap. I. 2.) In October, 1959 a similar motion and ruling were made. (R. Ap. I, 64.) These orders, as well as one made Nov. 17, 1959 were specified in the Notice of Appeal. (R. Ap. I, 90.) Appeals from these orders were dismissed as untimely before argument. (Opinion, C. A. *2 footnote.) Appeal from these orders was sought in order to avoid the possibility that they might obstruct restitution to the debtor of the diminution of its assets resulting from a wrongful reorganization proceeding. That such right of restitution will exist if this petition is ordered dismissed is indicated by *Northwestern Fuel Co.* v. *Brock* (1891), 131 U. S. 218, 219.

REASONS FOR THE ALLOWANCE OF THE WRIT.

I.

By the acceptance of a debtor's consenting answer, voted by a board of directors who were actively allied with the petitioning creditors in a scheme to use the process of the Bankruptcy Court to wrest control of the debtor corporation from the lawful holders of majority voting stock, as sufficient basis for the approval of a Chapter X reorganization petition, the Court of Appeals has rendered a decision in conflict with the decision of this Court in *Pepper* v. *Litton* (1939), 308 U. S. 295.

The threat of this Chapter X proceeding, and finally its actual filing, was used by Traylor, Moser, Krueger, *et al.* to coerce the Schepp majority either to buy minority stock and Traylor's claims or to sell the voting control at Traylor's own price. Traylor, through his *alter ego* corporations, became petitioning creditor. Traylor, Moser, and Krueger used their offices as debtor's directors to *confess* judgment of approval. By the decision in *Pepper* v. *Litton* a judgment *at law* so confessed by a corporate officer in his own favor as plaintiff may not even be recognized as a claim in bankruptcy. *Pepper* v. *Litton* (1939), 308 U. S. 295, 310-311. Here, we have the anomalous and topsy-turvy decision that such perversion of directors' functions may be made the basis of an adjudication under Chapter X.

II.

The recognition of this consenting answer voted by interested directors as a basis for the decree approving the petition and its perpetuation is also in conflict with the principles announced by this Court in *Geddes v. Anaconda*

Mining Co. (1921), 254 U. S. 590, 599, and with the principle more recently announced in *United States* v. *Mississippi Valley Generating Co.* (1961), 364 U. S. 520, 81 S. Ct. 294. The principle which forbids such action is identical with that of the statute involved in the case last cited; namely:

> "The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. * * *"

The Court of Appeals ignores the existence of the Traylor, Moser, Krueger disqualification to act for the defendant debtor with respect to litigation in which they were personally interested on the side of the plaintiffs (petitioning creditors) saying:

> "The consenting answer of the corporation is as equally attributable to the bona fide basis for seeking corporate reorganization as it is to a plan to coerce surrender of majority control to a minority group." (Op. C. A. 6.)

Directors using the reorganization process as a club to coerce purchase of their own individual corporate claims or surrender of controlling stock were personally interested in the matter upon which they voted, and therefore disqualified to vote at all. *Geddes* v. *Anaconda Mining Co.* (1921), 254 U. S. 590, 591.

III.

The recognition of this collusive consenting answer by the rendition and perpetuation of a decree of approval based thereon was a decision in conflict with the principle announced by this Court in *Harkin* v. *Brundage* (1927), 276 U. S. 36 which requires a Federal Court to relinquish a receivership otherwise unassailable, obtained by fraudu-

lently delaying a state court proceeding, and fraudulent misrepresentation to the Federal Court of the status of the state court proceeding.

Here, presenting as the act of the debtor a confession of judgment voted by interested directors was a palpable fraud on the Court. Upon discovery of this fraud it was the District Court's duty to dismiss the petition for reorganization. This results *a fortiori* from the requirement of § 146 of the Act (11 U. S. C. § 546) that a Chapter X petition must be filed in good faith.

IV.

The decision of the Court of Appeals that the presentation of an affidavit, known to contain material falsehoods, in support of a Chapter X reorganization petition does not conclusively negative the "good faith" requirement of 11 U. S. C. 146, constitutes the erroneous decision of an important question involving the application of Chapter X of the Bankruptcy Act which should be decided by this Court.

Since 1925, petitioning creditors whose claims are held by assignment or transfer from others have been required by G. O. 5(2) to file with the petition an affidavit stating the true consideration, and whether or not the claim was acquired for the purpose of instituting a bankruptcy proceeding. G. O. 5(2) 267 U. S. 613. Since the enactment of former § 77b, now embodied in 11 U. S. C. § 546, a reorganization petition shall be deemed not to be filed in good faith if the petitioning creditors have acquired their claims for the purpose of filing the petition.

By reason of G. O. 5(2) involuntary petitioners under Chapter X must convince the Court *in limine* that they have *not* acquired their claims for the purpose of the petition. Positive assertion upon personal knowledge is of course more convincing than one made on information and belief.

Stallings' false assertion of personal knowledge in the G. O. 5(2) affidavit (R. Ap. I, 11, 35, 36) was therefore a material falsehood. It was false swearing which was even perjurious under the decisions of this very Court of Appeals. *United States* v. *Henderson* (7th C. A. 1950), 185 F. 2d 189, 191; *United States* v. *Hendrickson* (7th C. A. 1952), 200 F. 2d 137, 139. In Kentucky this positive oath, without personal knowledge, would have been perjurious, even if the statement were in fact true. *Commonwealth* v. *Miles* (1910), 149 Ky. 577, 149 S. W. 385, 386. In the United States Courts of the Seventh Circuit, this type of prevarication is seemingly a harmless peccadillo.

Since this false swearing was not only known to, but actually procured by counsel for petitioning creditors (R. Ap. I, 36) it was clearly attributable to the petitioning creditors. *Harkin* v. *Brundage* (1927), 276 U. S. 36, 51.

Further falsehood appears in Stallings' original and in Traylor's substitute affidavit. The true consideration was *not* "$300,000 being paid by Producers, Inc. to Traylor Bros., Inc." The *true* consideration was merely a book credit to Traylor Bros. on Producers' books and a like credit to Traylor on Traylor Bros.' books. To assert that $300,000 was paid, when in truth it was only promised was both *suppresio veri*, and *suggestio falsi*. *No one* received a payment of $300,000. Traylor, not Traylor Bros., was "paid" by the book credits. Certainly, the *true* facts, not counsel's misleading interpretation, had important bearing both on the purpose of the acquisition and the *bona fides* of the ownership.

Thus the Court of Appeals has held that a creditor who knowingly submits false and misleading evidence to establish his good faith, may nevertheless be absolved from the *mala fides* conclusively established by such corrupt conduct. This decision conflicts directly with the rationale of the decision in *Keystone Driller Co.* v. *General Excavator Co.*

(1933), 290 U. S. 240, 247. In that case the use of prior adjudications which had been obtained by corrupt suppression of evidence was held such unconscionable conduct as to bar relief in equity. Here there was not merely suppression but falsehood, in the very case in which petitioners were required to establish "good faith". The decision of the Court of Appeals in this case is an open indorsement of chicanery.

Such perversion of both G. O. 5(2) and Section 146 (11 U. S. C. 546) of the Bankruptcy Act should be condemned by this Court.

V.

The Court of Appeals has decided that creditors intervening in an involuntary reorganization proceeding under Chapter X of the Bankruptcy Act after the initial adjudication and appointment of a trustee but before the conclusion of hearings on stockholders' answers prescribed by 11 U. S. C. 544, and after the discovery that the original petition was deficient, both as to number of creditors and good faith, may nevertheless be counted as petitioning creditors to supply the deficiency in number and lack of good faith.

We believe this to be a palpably erroneous decision of an important question which has not been, but should be decided by this Court.

Three creditors intervened "as additional petitioning creditors" after evidence that the three original petitioning creditors were in fact one (not three), that one of them (Industrial) was not in fact a creditor, that one of them had knowingly filed a false G. O. 5(2) affidavit, and that the original petition was part of a plan to coerce the majority stockholders to purchase the stock and claims of the minority or sell out. The Court of Appeals held that the

intervention of three new creditors somehow cured the defect of petitioners and absence of good faith, saying:

> "There is nothing to link the intervening petitioning creditors with what appellants assert was a plan by the minority to wrest control from the Schepps." C. A. Opinion *7.
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> "Assuming validity in any one of the three objections raised as to the status or qualification of the original petitioning creditors any deficiency so resulting was cured by the intervention." C. A. Opinion *8.

As to the right to count intervenors as additional petitioners to supply the defect in number, the Court of Appeals cited *Syracuse Engineering Co.* v. *Haight* (2nd C. A. 1940), 110 F. 2d 468 and 6 Collier Bankruptcy (14th Ed.) 1424-5.

The citation to Collier is based on the *Haight* case and the *Haight* case was a case of *ordinary* bankruptcy, not reorganization under Chapter X. It simply announces the construction of § 59(f) of the Bankruptcy Act (11 U. S. C. 95f) established by this Court in *Canute S. S. Co.* v. *Pittsburg & W. Va. Coal Co.* (1923), 263 U. S. 244. The last cited case (before 77b or Ch. X ever existed) held that § 59(f) is a section "supplementing and modifying the provisions of 59(b) in this respect."

Section 59(b) of the original Bankruptcy Act (11 U. S. C. 95(b)) corresponds to § 126 (11 U. S. C. 526) of Ch. X. Section 59(f) of the original act reads: "f. Creditors other than original petitioners may at any time enter their appearance and join in the petition." 11 U. S. C. 95(f). The intervention section following 11 U. S. C. 526 is 11 U. S. C. 607 which provides that "the judge may, for cause shown permit a party in interest to intervene generally or with respect to any specified matter." The difference in language is significant. Nothing in 11 U. S. C. 607 even

suggests that such intervenors may "join in the petition." It is perhaps significant that the same Court which decided the *Haight* case says that 11 U. S. C. 607 does not permit *intervention* by either creditors or stockholders. *Rudnick v. Coney Island Boardwalk Corp.* (2nd C. A. 1950), 181 F. 2d 775, 776.

No district court or Court of Appeals has held that 59(f) which permits new creditors to join in a bankruptcy petition *before* adjudication, applies to interventions in reorganization proceedings either before or after adjudication. At least two district courts have held the contrary. *In Re Flour Mills of America, Inc.* (D. C. Mo., 1939), 27 F. Supp. 559, 561. *In Re Associated Gas and Electric Co.* (D. C. N. Y. 1936), 14 F. Supp. 582, 583, 584.

Under general principles, delayed intervention cannot validate a proceeding defective in its inception even though the intervenors might have then brought an effective new proceeding.

In *U. S. ex rel. Texas Portland Cement Company v. McCord* (1914), 233 U. S. 157, 163, it was said:

> "* * * These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. Nor do we think that the intervention could be treated as an original suit. No service was made or attemtped to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be, an appearance in the original suit, already brought, and in our view must abide the fate of that suit." (pp. 163-164.)

The mischievous results of the decision on intervention are nowhere better illustrated than here. An unscrupulous

coalition of creditors and stockholders, by means of one false affidavit, one unfounded creditor's claim (Industrial), a show of three creditors in fact one, and a pretended consent voted by members of the coalition, having prevailed upon the District Judge to hamstring the debtor by receivership and the appointment of a trustee; other creditors not previously connected with the coalition are permitted to administer the death stroke. Under such conditions the "good faith" requirement of 11 U. S. C. 146 becomes a mockery.

VI.

By its decision on intervention the Court of Appeals tacitly decided that three separately incorporated companies in fact subject to a single will because of unitary control might nevertheless be counted as three creditors for the purpose of an involuntary petition for corporate reorganization.

We believe this to be the erroneous decision of an important question of the interpretation of § 126 of the Bankruptcy Act (11 U. S. C. 526) which has not been but should be decided by this Court.

Unless the three creditors who must concur in the desirability of instituting reorganization proceedings are *capable* of making a different and divergent decision, the requirement of *three* creditors (rather than one) becomes meaningless. It is not enough that separate legal titles to the separate claims exist. We suggest that this is the true rationale of such cases as *Stroheim et al. v. Lewis F. Perry & Whitney Co. et al.*, C. C. A., 1st C. (1910), 175 Fed. 52, 53.

In the above case two creditors holding promissory notes of which the third creditor's sister was the beneficial owner, were counted as one, not two. Obviously, they could

have brought separate actions at law. But neither of them was *able* to make an independent decision as to the desirability of bankruptcy. They were subject to a single will.

VII.

In dismissing the appeal from the injunctive order of Feb. 10, 1959, which was filed with the appeal from the final decree of Feb. 12, 1960, on the ground that it was not filed within the time allowed by 11 U. S. C. 48, the Court of Appeals decided, and we believe erroneously, that an interlocutory injunction in the course of bankruptcy proceedings must be appealed within 40 days of its rendition or not at all, and that unlike interlocutory orders in equity, it is not reviewable on appeal from the final decree.

We do not believe this precise question has been decided by the Supreme Court or any Court of Appeals.

However, the Court of Appeals for the Eighth Circuit has held that old Judicial Code § 129, (now 28 U. S. C. 1292) which first gave the right to appeal from certain interlocutory orders in equity, did not abolish the existing right to review such orders on appeal from a final decree. In *A & R Realty Co.* v. *Northwestern Mutual Life Ins. Co.* (8th C. A. 1938) 95 F. 2d 703, 707, the Court said:

> "2. The order appointing the receiver was not appealable after 30 days from the time it was entered, but is reviewable upon the appeal from the final decree. The entry of the order is assigned as error. Section 129 of the Judicial Code, as amended, 28 U. S. C. § 227, 28 U. S. C. A. § 227, permits an appeal from an interlocutory order within 30 days. Prior to the time that appeals from interlocutory orders were authorized, such orders were only subject to review upon appeal from final decrees. In *Marden* v. *Campbell-Printing-Press & Mfg. Co.*, 1 Cir., 67 F. 809, 816, this was pointed out, and it was held that the right granted by Congress to appeal from interlocutory

> orders is a privilege or option, and that, whether that right is availed of or not, the right to appeal from the final decree is not diminished. It would have been more accurate to say that if the right to appeal from the interlocutory order was not availed of, the failure to appeal would not diminish the right to a review of such order upon appeal from the final decree. * * *"

We submit that the same rule should apply in Bankruptcy since the amendment of § 47 (11 U. S. C. 47) to permit appeals as of right from *all* orders, except those demonstrably involving less than $500.00.

Since both the injunctive order of February 1959 and the final order of February 1960 were appealable as of right, there appears to be no reason why the 1959 interlocutory order should not be appealable with the final order.

VIII.

In applying to the orders of allowance made in this proceeding the inflexible time limit for appeal prescribed by § 250 of the Act (11 U. S. C. 650) we believe that the Court of Appeals has erroneously decided an important question not previously decided by this Court.

In this proceeding, although the petition had been approved Jan. 2, 1959, this approval actually remained *in fieri* and subject to be set aside until February 12, 1960. Accordingly, during this period, the Trustee had exactly the status of a receiver, *pendente lite*, and intervening interlocutory orders should be appealable with appeal from the *final* order confirming the appointment, under the rule announced in *A & R Realty Co.* v. *Northwestern Mutual Life Ins. Co.* (8th C. A. 1938), 95 F. 2d 703, 707.

Section 250 (11 U. S. C. 650) should only be applied to orders made after *final* approval of the petition, during the process of reorganization.

IX.

The following actions of the District Judge, sanctioned by the Court of Appeals constitute such a departure from the accepted course of judicial proceedings as to call for supervision by the Supreme Court:

(1) The district judge approved this Chapter X reorganization petition and appointed a trustee upon a consenting answer, when there was pending and undetermined a stockholders' answer which charged that the consenting answer was the product of a collusive combination between the debtor's directors and the petitioning creditors.

In so doing the district judge disregarded the express mandate of § 144 of the Act (11 U. S. C. 544) to hear such answers "as soon as may be". He also prejudged the issues made by the stockholders' answer in such a way as rendered him incapable of fairly hearing either these issues or those subsequently tendered by another stockholders' answer. Unconsciously, if not consciously, the district judge was bound to want to confirm (rather than undo) the step he so hastily and improvidently took.

(2) The district judge arbitrarily came to the aid of the petitioning creditors and corporate directors then charged (and later proved) to be in collusion with the petitioning creditors, by arbitrarily enjoining the majority stockholders from calling or holding a stockholders' meeting, without prior application for such injunction, without notice that an injunctive order was being considered, without affording opportunity to be heard, and in short, without any semblance of due process of law.

McVeigh v. *United States* (1870), 11 Wall. 259, 267.
Windsor v. *McVeigh* (1876), 93 U. S. 274, 277, 278.

(3) The district judge, after uncontradicted proof that a wilful and material falsehood had been included in an affi-

davit filed under G. O. 5(2), not only accepted an amended or substitute affidavit from the same creditor which was also demonstrably untrue, but also refused to recognize this false swearing as bearing upon the good faith of the petition.

Further elaboration is believed to be superfluous.

Petitioners pray that a Writ of Certiorari issue to review this judgment; that upon hearing of such writ the judgments of the District Court and of the Court of Appeals be reversed with directions that the debtor be restored to the possession of its assets in the custody of the trustee, and be made whole for the losses resulting from this proceeding.

PAUL Y. DAVIS,
Attorney for Petitioners Rex Schepp and Benjamin F. Shepp.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

September Term, 1960 — January Session, 1961.

In the Matter of
Evansville Television, Inc.,
Debtor.

No. 13024
Rex Schepp and
Benjamin F. Shepp,
Appellants.
vs.
Producers, Inc., *et al.*,
Appellees.

No. 13056
Stephen W. Langmade,
Appellant;
vs.
Producers, Inc., *et al.*,
Appellees.

Appeals from the United States District Court for the Southern District of Indiana, Evansville Division.

No. 13168
Rex Schepp,
Petitioner.
vs.
Honorable Cale J. Holder, Judge of The United States District Court for the Southern District of Indiana, Evansville Division,
Respondent.

Petition for Writ of Mandamus and Prohibition.

January 5, 1961.

Before DUFFY, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge*. Rex Schepp and Benjamin F. Shepp, appellants, stockholders of Evansville Television Inc., seek by their appeal (No. 13024) to set aside an order of the District Court entered February 12, 1960, in a chapter X Reorganization Proceeding, 11 U. S. C. A. § 501 *et seq.*, which approved and declared filed in good faith a petition to reorganize the subject corporation.[1] The appeal also seeks reversal of a February 10, 1959 order enjoining the calling or conducting of a meeting of stockholders for the purpose of electing directors until further order of court.

The appeal (No. 13056) by Stephen W. Langmade, also a stockholder, seeks to set aside the order of February 12, 1960.[1]

The petition for reorganization of the subject corporation invoked the District Court's jurisdiction under 11 U.S.C.A. §§ 526, 530 and 531, was filed by creditors, and alleged insolvency and the commission of an act of bankruptcy within the preceding four months. The debtor corporation filed a consenting answer. Appellants Rex and Benjamin Shepp each filed a controverting answer. The District Court, after hearing evidence, made findings of fact and entered its conclusions of law on which the order of February 12, 1960, is based.

The appeals present the following contested issues:

(1) Whether the provision of 11 U. S. C. A. § 526 which authorizes the filing of a petition for reorganization by "three or more creditors" was satisfied.

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1. By their respective Notices of Appeal appellants included certain additional orders from which appeals were sought to be prosecuted. On motions of appellees the appeals from such orders were dismissed by this Court as untimely.

(2) Whether the subject corporation was insolvent.

(3) Whether the petition was filed in good faith.

(4) Whether a timely appeal was perfected from the injunctive order and, if so, did the court err in entering such order.

The debtor, Evansville Television, Inc., was incorporated in 1951 with authorized capitalization of 25,000 shares of Class A no par voting stock and 25,000 shares of Class B

equally participating no par non-voting stock. It is engaged in the operation of a television broadcasting station in Evansville, Indiana, under a temporary permit granted by the Federal Communications Commission on the VHF Channel 7, and is known as Station WTVW. The station began broadcasting in August of 1956. It was one of four applicants in 1952 for the one VHF channel in Evansville. It was awarded the channel on December 27, 1955. During pendency of the application others obtained construction permits for two UHF channels, one in Evansville and one in Henderson, Kentucky, and began broadcasting in 1953. Upon the grant of the VHF permit to the debtor corporation both UHF stations petitioned the Commission to revoke it on the basis that the superior signal would cause them great economic injury. These petitions were denied but there is pending before the Commission a Rule to Show Cause why the corporation should not be required to relinquish its temporary VHF permit and receive a UHF permit in lieu thereof.

At the time construction was authorized and the temporary VHF permit issued in December of 1955 Rex Schepp, his wife, Mary Eaton Schepp, and his brother, Benjamin F. Shepp held approximately 72% of the corporation's stock, including 16,875 shares of the Class A voting stock.

Ferris E. Traylor, Freeman Keyes and John B. Moser, executor, held a total of 4,125 shares of Class A and 3,158 of Class B stock; various others, smaller amounts. All stockholders except the Schepps[2] were obligated on unpaid stock subscriptions. As a condition of paying the balance of their subscriptions Traylor, Keyes, Moser and another stockholder, Krueger, required a reallocation of the Schepp stock interest, a voting trust to control election of directors, and a buy-sell agreement. The agreement reduced the Schepp holdings to 15,000 shares of Class A stock, gave the minority group the option to purchase the Schepp stock at appraised value (not less than $15.00 per share) exercisable two years and ten days after WTVW went on the air, and placed all voting stock in the hands of Krueger, as trustee, to vote for a board of directors consisting of Rex Schepp and four members of the minority group, which was to continue until the option expired.

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Schepp was made president and employed as general manager of the corporation. He had had previous experience in the television field. Station facilities were constructed and WTVW went on the air in August of 1956. In November of 1956 Schepp was discharged as president and general manager. The reasons given, as shown in the corporation's minutes, were disloyalty, unfaithfulness, neglect of duties, wilful mismanagement and harassment of employees resulting in inefficient operation.

The purchase option expired August 31, 1958, without being exercised. The return of Schepp to control of the corporation at the February 1959 annual meeting was assured by reason of his control of the voting stock. There

2. The Schepps had received an aggregate of $150,000.00 of stocks for services and expenses.

were various negotiations for the purchase from or sale to Schepp of the capital stock of the corporation. Traylor was willing to pay $10.00 a share for the stock.

Producers, Inc., one of the petitioning creditors, is a corporation to which the debtor corporation owes $300,000.00, plus interest, as evidenced by twenty-seven promissory notes. The notes were originally given to Ferris E. Traylor for loans and advancements made to the corporation when money was immediately needed, at most times to cover overdrafts, between December 12, 1956 and May 9, 1958. Traylor assigned them to Producers, Inc., on November 20, 1958.

Traylor Bros., Inc., a petitioning creditor, is a corporation engaged in the construction business. Schepp, while president, hired it in connection with the construction of the station facilities and improvement of its studios. The claim of Traylor Bros., Inc., in the amount of $65,675.15 is for work performed and materials furnished.

Industrial Contractors, Inc., a petitioning creditor, is a corporation engaged in the plumbing, heating and air conditioning and roofing business. The debtor corporation through its chief engineer issued direct orders to it for work and materials which were performed and furnished, and for which it issued invoices directly to the debtor corporation. The amount of its claim is $41,163.53.

The stock ownership of Traylor Bros., Inc., is 50% in Ferris E. Traylor and 50% in his brother. The stock of Producers, Inc., is similarly owned. Traylor and his brother each own 25% of the stock of Industrial Contractors, Inc.,

and the remainder is held by employees of the three companies.

Other creditors, who were permitted to intervene as peti-

tioning creditors, are Carl Wolfe, d/b/a Ohio Valley Sound Co., Smith and Butterfield, Inc., and Red Spot Paint and Varnish Company, Inc.

The petition for reorganization was filed December 19, 1958.

The District Court, after exhaustive hearings extending over a period from February 26, 1959 to January 7, 1960, found and concluded that the corporation was insolvent and that the petition for reorganization was filed in good faith. In so far as these determinations rest on factual considerations they are not to be disturbed on review unless clearly erroneous. The District Court is charged with the duty of ascertaining the existence or non-existence of the fact. *In Re Loeb Apartments*, 7 Cir., 89 F. 2d 461, 463.

We have carefully reviewed the record and are of the opinion that the finding of insolvency is supported by substantial evidence including the testimony of an expert witness in the field of evaluating television and radio properties and that of a certified public accountant who had made extensive examination of the corporation's records. The evidence was ample that the corporation's assets were insufficient to meet its liabilities.

This Court had occasion to consider the criteria by which the "good faith" requirement in chapter X proceedings is to be determined in *In Re Diversey Hotel Corporation*, 7 Cir., 165 F. 2d 655, 658. It was there pointed out that what is meant in chapter X by "good faith" is not the same as breach of fiduciary integrity but is a restriction on the use of this remedy to prevent its misuse. And it was pertinently observed that the District Court, charged with the duty of preventing this misuse being "in a favored position, it can well judge of the disposition and intent of those who knock at its door and seek admission."

There was testimony that the corporation had never

had an annual profit, could not even approximate the payment of current liabilities, that attempts to get financing had been going on for two years with no avail and that the corporation was "at the end of its rope" in so

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far as borrowing money was concerned and could not go forward without reorganization. Traylor, who had advanced $300,000.00, testified that he would not "put another dollar in the situation" without revision of the stock situation and capital structure. It is evident that there was a basis on which the District Court's jurisdiction under chapter X could have been invoked in "good faith". And it is equally deducible from the record that the relationship between Traylor and Schepp if not acrimonious was at least unharmonious. Traylor was frank in admitting that an additional reason for the petitioning creditors filing the proceeding was "[t]he Schepp interests coming back into control of the corporation and in my opinion endangering the loans by upsetting the present management of the corporation".

Appellants contend that the primary if not the sole reason for the filing of the petition was to wrest control from the Schepps. They urge, in effect, that we disregard the existence of the bona fide grounds for corporate reorganization and find clear error in the District Court's finding of good faith. In this connection we are importuned to accept as justification of such action factors such as the execution of a supporting affidavit filed with the petition on "personal knowledge" by an affiant who it later developed did not have personal knowledge of the fact sworn to; the filing of a consenting answer of the corporation by a board of directors which included Traylor and the majority of which did not favor control of the corporation by the Schepps; attempts of Traylor and other

minority stockholders to induce the Schepps to buy out Traylor's claims and the minority stock or sell the Schepp stock to them; and Traylor's transfer of the corporation's notes to Producers, Inc.

The incident of the affidavit, which was corrected by a new affidavit, in our opinion had no bearing on the issue of good faith either as to the objective of the proceeding or intention of the petitioners. The consenting answer of the corporation is as equally attributable to the bona fide basis for seeking corporate reorganization as it is to a plan to coerce surrender of majority control to a minority group. The various negotiations relating to buy-sell agreements were, of course, attempts by Traylor as a major creditor (or as owner of a substantial interest in corpo-

rations which were major creditors) to collect the debt owed him and dispose of his interest or to retain a voice in the management of this corporation in which he had a heavy financial interest as such creditor. The fact that he offered $10.00 a share for the Schepp stock in an effort to protect his heavy investment is not indicative that he regarded the corporation solvent at the time but rather an expression of confidence as to the future of the corporation premised on his purchase of the Schepp stock and the latter's consequent disassociation from management. Appellants' contention that Traylor's assignment of the $300,000.00 in notes of the corporation to petitioning creditor, Producers, Inc., in and of itself establishes lack of good faith in the filing of the petition is based on the provision of 11 U. S. C. A. § 546(1) that a petition shall be deemed not to be filed in good faith if "the petitioning creditors have acquired their claims for the purpose of filing the petition." But the only evidence presented on the purpose

of the transfer[3] was that of Traylor who testified that the assignment was made so he could secure funds to settle a personal income tax situation.

Traylor's dissatisfiaction with Schepp management may well have motivated his actions to insulate his investment from its resumption of control but under the circumstances here present we cannot say that the District Court was clearly in error in finding that the petition was filed in good faith. Here was an insolvent corporation with but a temporary permit to pursue the activities upon which its financial existence depended. And it was unable to obtain needed financing. The major creditors expressed willingness to convert their claims into stock to provide a financial structure which would enable borrowing. In addition there is nothing to link the intervening petitioning creditors with what appellants assert was a plan by the minority to wrest control from the Schepps. The District Court was justified in approving the petition and awaiting the facts that arise from a plan of reorganization. That plan must be fair and equitable, and feasible. 11 U. S. C. A. § 621 (2).

We find other arguments of appellants addressed to the issue of good faith equally devoid of merit. On this phase

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of the matter we conclude that there was substantial evidence to support the findings of the District Court and from our review of the record we are not "left with the definite and firm conviction that a mistake has been committed." *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395.

Further, we find no error in the District Court's refusal

3. Aside from the affidavit required by G. O. 5 and G. O. 52(2), 11 U. S. C. A. foll. § 53, supporting the claim of Producers, Inc., to the effect that the notes were not purchased for the purpose of instituting the proceedings.

to admit and consider evidence concerning the terms, and rejection by Traylor, of an offer to purchase the minority group's stock and pay the debts owed the corporations in which Traylor was interested. These negotiations occurred during a recess in the proceedings pursuant to the court's suggestion that a compromise settlement be attempted. Counsel for petitioners expressly conditioned undertaking compromise discussions on the understanding that "it will not be used as evidence in this matter."

Appellants raise a question as to whether the petition was filed by the requisite number of creditors. Under the provisions of 11 U. S. C. A. § 526 which are here pertinent an involuntary petition for corporate reorganization if filed by creditors requires "three or more creditors". Appellants argue that Traylor's stock interest in Producers, Inc., Traylor Bros, Inc., and Industrial Contractors, Inc., requires, that for the purpose here involved, the three corporate entities must be regarded as but one; that Industrial Contractors, Inc., was but a subcontractor of Traylor Bros., Inc., and not a creditor of the debtor corporation; and that in any event the work performed by Industrial was unauthorized and created no liability in the debtor corporation.

We find it unnecessary to consider any of these arguments. Three additional creditors filed a petition to intervene while the issues raised by the controverting answers were in the process of being heard. They alleged that it was for their best interests that the chapter X proceeding be maintained and requested permission to intervene as "petitioning creditors". The District Court granted the petition and we find no error in its so doing. Assuming validity in any one of the three objections raised as to the status or qualification of the original petitioning creditors any deficiency so resulting was cured by the intervention.

Such intervention is authorized under 11 U. S. C. A. § 607. *Seaboard Terminals Corp.* v. *Western Maryland Ry. Co.*, 4 Cir., 108 F. 2d 911, 914; and see dictum in *In Re Federal Facilities Realty Trust*, 7 Cir., 220 F. 2d 495, 500-501. We do not agree with appellants that 11 U. S. C. A. § 596 limits § 607 so as to authorize intervention only after approval of the petition. And where a creditor has been properly permitted to intervene he is to be counted in determining the existence of the requisite number of creditors. Cf. *Syracuse Engineering Co.* v. *Haight*, 2 Cir., 110 F. 2d 468; 6 Collier on Bankruptcy (14th ed.) 1424-5.

The February 12, 1960 order of the District Court approving and declaring the petition for reorganization filed in good faith is affirmed.

The injunctive order restraining the calling or conducting of a meeting of stockholders for the purpose of electing directors until further order of the court was entered February 10, 1959. The notice of appeal (13024) was not filed until February 23, 1960, more than one year later. Under 11 U. S. C. A. § 47 interlocutory or final orders in *proceedings in bankruptcy* as distinguished from "controversies arising in bankruptcy" are appealable. The injunctive order was a "proceedings in bankruptcy" order. *Albin* v. *Cowing Pressure Relieving Joint Co.*, 317 U. S. 211, 212. This Court has held that an order in a proceedings in bankruptcy from which an appeal may be taken, may be reviewed on appeal from that order only and may not be reviewed on an appeal from a subsequent order. In *In re Trust No. 2988 of Foreman Trust & Savings Bank, Debtor*, 7 Cir., 85 F. 2d 942, 943, we said:

> "An order in bankruptcy proceedings, from which either an absolute or discretionary appeal may be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order. *Fon-*

tana Mercantile Co., Inc., 62 F. (2d) 1047 (C. C. A. 9); *Wheeler* v. *Smith*, 30 F. (2d) 59 (C. C. A. 9); *In re Kest*, 78 F. (2d) 705 (C. C. A. 2); *In re S. W. Straus & Co.*, 67 F. (2d) 605 (C. C. A. 2). Otherwise a party might permit the time within which to appeal from an interlocutory order to expire and then by an appeal from a final order, by indirection, achieve a review of something which it was not entitled to review."

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We adhere to the view above expressed. The time for appeal from the injunctive order ended not later than forty days after its entry. 11 U. S. C. A. § 48. The appeal in No. 13024 in so far as it purports to include the injunctive order of February 10, 1959 is dismissed as untimely.

No. 13168 is an application by Rex Schepp to this Court for a writ of mandamus and prohibition directed to the District Court ordering that no further action be taken to hear, consider or approve a plan of reorganization of the subject corporation until the appeal in No. 13024 is determined, to set aside and expunge the injunctive order of February 10, 1959, or to sustain a pending motion to vacate such injunction or to rule upon such motion. Apart from the question of the propriety and availability of the remedies petitioner seeks to employ for the purpose indicated under the particular circumstances here involved our disposition of the appeal in No. 13024 requires denial of the petition for writ of mandamus and prohibition. Our affirmance of the District Court's order of February 12, 1960 approving and declaring the reorganization petition filed in good faith makes moot the request that further action of the District Court be stayed pending disposition of that appeal. As to the relief sought with respect to the injunctive order of February 10, 1959 and the motion to vacate said injunction we are of the opinion that petitioner may not so use the writ of mandamus as a substitute for

the relief he failed to seek by a timely appeal. Nor does his petition set forth any change in circumstances in fact or law since entry of the order which establishes a clear legal right to vacation of such order. Consequently, we are of the opinion that petitioner has failed to demonstrate a right to compel the District Court to take the action he requests. The application for a writ of mandamus and prohibition is denied.

JUDGMENT ORDER APPROVING REORGANIZATION PETITION AFFIRMED; APPEAL FROM INJUNCTIVE ORDER DISMISSED; PETITION FOR WRIT OF MANDAMUS AND PROHIBITION DENIED.

APPENDIX B.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Thursday, January 5, 1961.

Before

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Win G. Knoch, Circuit Judge,
Hon. Latham Castle, Circuit Judge.

In the Matter of Evansville Television, Inc., Debtor.	
Rex Schepp and Benjamin F. Shepp, and Stephen W. Langmade, *Appellants*, vs. Producers, Inc., *et al.*, *Appellees*.	Appeal from the States District Court for the Southern District of Indiana, Evansville Division.
No. 13024-13056	

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Evansville Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order approving reorganization petition, in this cause appealed from be, and the same is hereby, AFFIRMED; and the appeal from the injunctive order of the said District Court be, and the same

is hereby, DISMISSED; in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs of these appeals be taxed against the respective appellants.

APPENDIX C.

STATUTES.

I.

Jurisdictional Statutes.

28 U. S. C. 1254(1).

"§ 1254. Courts of appeals; certiorari; appeal, certified questions—Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

28 U. S. C. 2101(c).

"§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay— * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree * * *"

11 U. S. C. 47(c).

"§ 47. Jurisdiction of appellate courts—

(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. * * *"

II.

Other Statutes.

28 U. S. C. 1292.

"§ 1292. Interlocutory decisions.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court:

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property:* * *"

Bankruptcy Act, § 59(b) and (f), 11 U. S. C. § 95(b) and (f).

"§ 59. Who May File and Dismiss Petitions.* * *

(b) Three or more creditors who have provable claims liquidated as to amount and not contingent as to liability against any person which amount in the aggregate in excess of the value of securities held by them, if any, to $500 or over, or, if all of the creditors of such person are less than twelve in number, then one or more of such creditors whose claim or claims equal such amount, may file a petition to have him adjudged a bankrupt. * * *

(f) Creditors other than original petitioners may at any time enter their appearance and join in the petition.* * *"

Bankruptcy Act § 126, 11 U. S. C. § 526.

"Sec. 126. A corporation, or three or more creditors who have claims against a corporation or its property amounting in the aggregate to $5,000 or over,

liquidated as to amount and not contingent as to liability, or an indenture trustee where the securities outstanding under the indenture are liquidated as to amount and not contingent as to liability, may, if no other petition by or against such corporation is pending under this chapter, file a petition under this chapter."

Bankruptcy Act § 136, 11 U. S. C. § 536.

"Sec. 136. Within ten days after the service of the subpoena and of a copy of the petition, or within such further time as the court may for cause shown allow, an answer controverting the facts alleged in the petition may be filed by the debtor."

Bankruptcy Act § 137, 11 U. S. C. § 537.

"Sec. 137. Prior to the first date set for the hearing provided in section 161 of this Act, an answer controverting the allegation of a petition by or against a debtor may be filed by any creditor or indenture trustee or, if the debtor is not insolvent, by any stockholder of the debtor."

Bankruptcy Act § 142, 11 U. S. C. § 542.

"Sec. 142. If an answer is not filed by a debtor to a petition against it, or if the answer filed does not controvert any material allegation of the petition, the judge shall enter an order approving the petition if satisfied that it complies with the requirements of this chapter and has been filed in good faith or dismissing it if not so satisfied."

Bankruptcy Act § 144, 11 U. S. C. § 544.

"Sec. 144. If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied

that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied."

Bankruptcy Act § 146 (1), 11 U. S. C. § 546(1).

"Sec. 146. Without limiting the generality of the meaning of the term 'good faith', a petition shall be deemed not to be filed in good faith if

(1) the petitioning creditors have acquired their claims for the purpose of filing the petition; * * *"

Bankruptcy Act § 161, 11 U. S. C. § 561.

"Sec. 161. The judge shall fix a time of hearing, to be held not less than thirty days and not more than sixty days after the approval of the petition; of which hearing at least thirty days' notice shall be given by mail to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission and such other persons as the judge may designate, and, if directed by the judge, by publication in such newspaper or newspapers of general circulation as the judge may designate."

Bankruptcy Act § 206-207, 11 U. S. C. § 606-607.

"Sec. 206. The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

"Sec. 207. The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given."

General Orders in Bankruptcy, 5(2), 267 U. S. R. 613.

"General Orders in Bankruptcy, Promulgated April 13, 1925.

It is ordered by the court that General Order in Bankruptcy No. 5, entitled "Frame of Petition," be amended by adding at the end thereof the following sentence:

Petitioners in involuntary proceedings whose claims rest upon assignment or transfer from other persons shall annex to one of the duplicate petitions all instruments of assignment or transfer, and an affidavit setting forth the true consideration paid for the assignment or transfer of such claims and stating that the petitioners are the bona fide holders and legal and beneficial owners thereof, and whether or not they were purchased for the purpose of instituting bankruptcy proceedings." * * *"

Bankruptcy Act § 250, 11 U. S. C. § 650.

"Sec. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."